

No. 2056

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Plaintiff in Error,

vs.

THOMAS CLARK,

Defendant in Error.

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Transcript of Record.

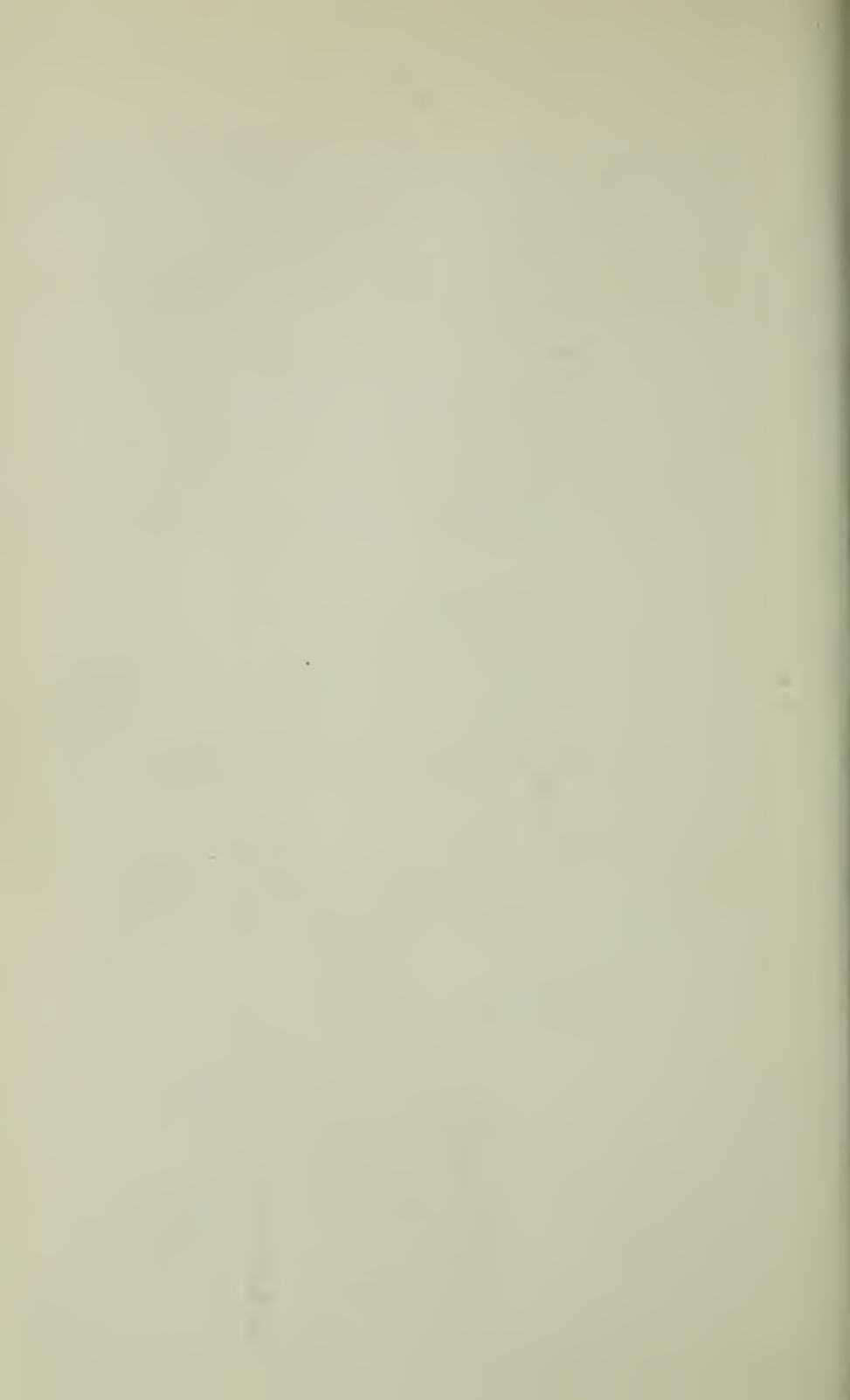
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Upon Writ of Error to the United States Circuit Court for  
the District of Montana.

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FILED

DEC 13 1911



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

A. C. McDANIELS, of Butte, Montana, and  
WALSH & NOLAN, of Helena, Montana,  
Attorneys for Plaintiff and Defendant in  
Error.

M. S. GUNN, Helena, Montana,  
Attorney for Defendant and Plaintiff in  
Error.

---

[Transcript on Removal.]

*In the Circuit Court of the United States, Ninth  
Circuit, District of Montana.*

No. 836.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Defendant.

BE IT REMEMBERED, that on the 9th day of  
July, 1907, a Transcript on Removal of said cause  
from the District Court of Silver Bow County, Mon-  
tana, was duly filed herein, said Transcript on Re-  
moval being in the words and figures following, to  
wit: [1\*]

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\*Page number appearing at foot of page of original certified Record.

*In the District Court of Silver Bow County, Mon-  
tana.*

No. —.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO. (a Cor-  
poration),

Defendant.

**Complaint.**

Plaintiff alleges:

1. That the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of Wisconsin, and doing business in the State of Montana; and is operating a line of railroad in and about the city of Butte, Silver Bow County, Montana, and is operating said line of railroad from the eastern boundary line of the State of Montana to the western boundary line of the State of Montana; and that it was so engaged in operating said railroad on the 17th day of November, 1906.

2. That on said date and for a long time prior thereto the said defendant was in control of and operating a series of parallel tracks lying immediately east of and northeast of the Freight Depot of the said defendant in the city of Butte, Silver Bow County, Montana, which said tracks extended more than two hundred yards east of said freight depot. That there is now and for many years heretofore has been a [2] public highway branching off of east Platinum Street, Butte, Montana, at about the inter-

section of East Platinum Street and Beatie Avenue, which said public highway runs in an easterly direction and then in a southerly direction and crosses said tracks. That said public highway has been used for a highway, public street or roadway and been regarded as such for more than ten years; and that portion which is now crossed by the said tracks of the defendant has been continually traveled over and used for a great number of years by the public. That the said defendant was on the 17th day of November, 1906, and for a long time prior thereto had been engaged in running numerous cars and engines over said tracks. That the said public highway crossing said tracks was very continuously and extensively used for travel by the public, and that such fact was well known to defendant and its servants. That by reason of the frequent operation of engines and cars thereover, and the use thereof by the public, said crossing was a dangerous place for persons passing thereover, and that the operation of the said engines and cars thereover endangered the lives of such persons, which fact was well known to the defendant and its servants.

3. That on the 17th day of November, 1906, the defendant placed an engine and at least three cars on a certain one of said tracks crossed by the said public highway, the said engine being attached to said cars, and east of them; that the said engine and cars backed westerly until the front end of the engine was west of the point where said public highway crosses the said track, and the said engine and cars stopped. That while said engine and cars were

#### 4      *The Northern Pacific Railway Company*

backing westerly, this plaintiff was driving a wagon and team along said public [3] highway and north of said track; that when said engine and cars had stopped and were standing still, this plaintiff started to drive the said wagon and team across the said track; that without warning and carelessly and negligently, and without exercising ordinary care, the said defendant, by its servants, while said plaintiff was in the act of crossing the said track and in said public highway, suddenly and with great force and speed, started said engine easterly along said track and towards said highway and said plaintiff. That the said engine struck the wagon on which this plaintiff was riding and struck and knocked the plaintiff to the ground. That when the said engine so struck and knocked said plaintiff as aforesaid, the blow and collision resulting therefrom seriously hurt, cut, bruised, wounded and disfigured said plaintiff, and greatly *shock* and injured him, and rendered him immediately insensible, in which insensible condition he remained for a space of about two hours; that his head was seriously cut, bruised, wounded and disfigured; that his body was seriously hurt, bruised and wounded, all of which said injuries so inflicted made the plaintiff sick and sore, and obliged him to be confined in a hospital for a long time, and caused him great mental and physical suffering; and that plaintiff is permanently injured and disfigured as a result of said blow and collision. That the servants of the said defendant could have seen and did see and ought to have seen the plaintiff's position and

danger; and that defendant could have, in the exercise of ordinary care and caution, prevented him from being injured as aforesaid, but did not so protect him. [4]

4. Plaintiff alleges that by reason of the negligence and lack of ordinary care and caution on the part of said defendant, he was injured as aforesaid; and that by reason thereof he has sustained damages in the sum of five thousand (\$5,000.00) dollars; no part of which has been paid.

5. Plaintiff alleges that by reason of the injuries received as aforesaid, he was confined in a hospital for a period of about thirty-three days, and it became and was necessary for him to pay the sum of about two hundred and eighteen (\$218.00) dollars for physicians' and surgeons' fees and hospital fees, and he is thereby damaged in the sum of two hundred and eighteen dollars, which said sum is the reasonable value paid for said services.

6. That on said 17th day of November, 1906, the date the said injuries were received, this plaintiff was following the occupation of a teamster, and earning three dollars per day, which said sum is the reasonable value of his services per day; that by reason of the injuries received as aforesaid, this plaintiff was unable to follow any occupation whatever until March 1st, 1907; and he is thereby damaged in the sum of three hundred and twelve (\$312.00) dollars.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of five thousand, five hun-





of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Witness my hand and the seal of said Court this 20th day of May, A. D. 1907.

[Court Seal]                      WILLIAM E. DAVIES,  
Clerk.

By L. F. Kirby,  
Deputy Clerk.

Sheriff's Office,  
County of Silver Bow, Montana.

I do hereby certify that I received the within Summons on the 20th day of May, A. D. 1907, and personally served the same on the 21st day of May, A. D. 1907, by exhibiting the original and delivering a true copy thereof, together with a copy of the complaint in said action, to J. A. McMillian, agent of the defendants Northern Pacific Railway Co., a corp., in the county of Silver Bow, Montana, they being the defendants named in said Summons.

Dated this 21st day of May, A. D. 1907.

CHAS. S. HENDERSON,  
Sheriff.

By Wm. M. Bowen,  
Dept. Sheriff.

8     *The Northern Pacific Railway Company*

Copy.....	.....\$.....
Service.....	.....\$1.00
Mileage.....	.....20
	-----
Total.....	.....\$1.20

Duly verified.   [7]

**[Petition for Removal.]**

*In the District Court of the Second Judicial District  
of the State of Montana, in and for Silver Bow  
County.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Defendant.

To the Honorable the District Court of the Second  
Judicial District of the State of Montana, in  
and for the County of Silver Bow:

Your petitioner, Northern Pacific Railway Com-  
pany, respectfully shows unto this Honorable Court  
that it is the defendant in the above-entitled action;  
that the matter and amount in dispute in said action,  
which is of a civil nature at law, exceeds, exclusive of  
interest and costs, the sum of Two Thousand Dollars.

That your petitioner, Northern Pacific Railway  
Company, was, at the time of the commencement of  
said suit, and prior thereto and ever since has been  
and yet is a corporation, organized and existing  
under and by virtue of the laws of the State of  
Wisconsin, and a citizen of said State; and that the



plaintiff Thomas Clark was, at the time of the commencement of said suit, and still is, a citizen of the state of Montana. And that your petitioner, as such corporation, and in compliance with the laws of the State of Montana relating to foreign corporations, has designated an agent for the State of Montana, upon whom service of all process may be had, and has filed such designation, together with the consent of such agent, with the Secretary of State of Montana; and that the principal [8] place of business of your petitioner within the State of Montana now is at the city of Helena, Montana, and was so for a long time prior to the commencement of said suit, and was at the time of the commencement thereof, and now is, at Helena, Montana; and that the residence of such statutory agent and the place of business of said defendant Northern Pacific Railway Company is so designated as at Helena, in the certificate so filed with the Secretary of State of the State of Montana; and the aforesaid designation of agent for the service of process and the consent of such agent was done and had long prior to the commencement of this suit, and was in full force and effect and unrevoked, and said agent was so residing at Helena, aforesaid, at the time of the commencement of this suit; and also at the time of the service of summons and copy of complaint.

Your petitioner further alleges that said action is brought to recover damages in the sum of \$5,530.00 on account of personal injuries alleged to have been sustained by plaintiff on or about November 17th, 1906, by being struck by an engine and cars of the

defendant while riding upon a wagon across the railroad tracks of this defendant in Butte, Montana, whereby plaintiff received certain injuries, as he alleges, to his head and body.

Your petitioner further offers and files herewith a bond with good and sufficient sureties for its entering in the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto. [9]

WHEREFORE, your petitioner prays this court to accept this petition and the said bond and to approve the same, and proceed no further in said action save to cause the record therein to be removed to the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, at Helena, Montana. And so your petitioner will ever pray.

NORTHERN PACIFIC RAILWAY COMPANY.

By WM. WALLACE, Jr.,  
Its Division Counsel.

State of Montana,  
County of Lewis & Clark,—ss.

Wm. Wallace, Jr., being first duly sworn, makes oath and says:

That he is an officer of the Northern Pacific Railway Company, above named petitioner, to wit: Its Division Counsel for the State of Montana, and as such makes this verification for and on its behalf;

that he has read the foregoing petition and knows the contents thereof and the matters and things therein stated are true to the best of his knowledge, information and belief.

WM. WALLACE, JR.

Subscribed and sworn to before me this 3d day of June, 1907.

[Seal]

R. F. GAINES,

Notary Public, in and for Lewis & Clark County,  
Montana.

Duly verified. [10]

**[Bond on Removal.]**

*In the District Court of the Second Judicial District  
of the State of Montana, in and for Silver Bow  
County.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
Defendant.

KNOW ALL MEN BY THESE PRESENTS, that Northern Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, as principal, and E. S. Richards and E. W. Beattie, as sureties, are held and firmly bound unto Thomas Clark in the penal sum of One Hundred Dollars, for the payment of which, well and truly to be made to said Thomas Clark, plaintiff, we bind ourselves and our repre-

sentatives, successors, heirs and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 3d day of June, 1907.

THE CONDITION OF THIS ONLIGATION IS SUCH THAT WHEREAS the said Northern Pacific Railway Company, defendant in the above-entitled action is about to petition the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, for the removal of a certain cause therein pending, wherein Thomas Clark is plaintiff and Northern Pacific Railway Company is defendant, to the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, at Helena, Montana:

NOW, if said Northern Pacific Railway Company shall enter into said Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, on the first day of its next session, a copy of the record in said suit, and well [11] and truly pay all costs that may be awarded by said Circuit Court, if such court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

Witness our hands and seals this 3d day of June, 1907.

NORTHERN PACIFIC RAILWAY COMPANY.

By WM. WALLACE, Jr.,  
Its Division Counsel.  
E. S. RICHARDS.  
E. W. BEATTIE.

State of Montana,  
County of Lewis & Clark,—ss.

E. S. Richards and E. W. Beattie, being each duly sworn, for himself says: That he is a resident and freeholder of the State of Montana; is responsible and one of the sureties who subscribed the foregoing bond; that he is worth the sum of Two Hundred Dollars over and above his just debts and liabilities and exclusive of property exempt from execution by law.

E. S. RICHARDS.

E. W. BEATTIE.

Subscribed and sworn to before me this 3d day of June, 1907.

[Seal]

R. F. GAINES,

Notary Public, Lewis & Clark County, Mont.

The foregoing bond, both as to form thereof and sufficiency of sureties, is this day approved.

Dated, 7th June, 1907.

GEO. M. BOURQUIN,

Judge of said Court.

Duly verified. [12]



[**Order for Removal of Cause to Circuit Court.**]

*In the District Court of the Second Judicial District  
of the State of Montana, in and for Silver Bow  
County.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COM-  
PANY,

Defendant.

On this 7th day of June, the above action coming on to be heard on defendant, Northern Pacific Railway Company's petition for removal of the said cause to the United States Circuit Court, Ninth Circuit, in and for the District of Montana, at Helena, Montana; and it appearing to me that the said defendant is entitled to have said cause removed to said court; and that a good and sufficient bond has been filed in said action, conditioned as by the Acts of Congress provided:

NOW, THEREFORE, it is ordered that the said bond be approved and that the said suit and action be and the same hereby is removed to the United States Circuit Court, Ninth Circuit, in and for the District of Montana, at Helena, Montana; and the Clerk of this court is hereby authorized, ordered and directed to furnish the petitioner, Northern Pacific Railway Company, defendant herein, a duly certified copy of the record in this case upon the payment of the legal and customary fees for preparing said record. And this court will proceed no further in said

action unless the same shall be remanded from the Circuit Court as aforesaid.

Signed and passed in open court this 7th day of June, 1907.

GEO. M. BOURQUIN,  
Judge of said Court. [13]

---

**[Demurrer to Complaint.]**

*In the District Court of the Second Judicial District  
of the State of Montana, in and for the County  
of Silver Bow.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COM-  
PANY,

Defendant.

Comes now the above-named defendant and demurs to the complaint of plaintiff on file herein for that the same does not state facts sufficient to constitute a cause of action.

WALLACE and DONNELLY,  
Attorneys for Defendant.

Duly verified. [14]

State of Montana,  
County of Silver Bow,  
Office of the Clerk of the Court,—ss.

I, William E. Davies, Clerk of the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County, do hereby certify that the above and foregoing 17 pages constitute

and are a full, true, compared and correct copy of the record on removal in said cause of Thomas Clark vs. Northern Pacific Railway Company, being respectively the complaint, summons and return, petition for removal, bond on removal, order of removal to the United States Circuit Court, District of Montana, at Helena, Montana, and demurrer to complaint.

Witness my hand and the seal of said court this 20 day of June, 1907.

[Seal]

WILLIAM E. DAVIES,  
Clerk of said Court.

[Indorsed]: Title of Court and Cause. Transcript on Removal. Filed July 9, 1907. Geo. W. Sproule, Clerk. [15]

---

And thereafter to wit, on December 7, 1908, an order overruling demurrer was duly made and entered herein, being in the words and figures following, to wit:

**[Order Overruling Demurrer to Complaint.]**

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

No. 836.

THOMAS CLARK

vs.

NORTHERN PACIFIC RAILWAY CO.

This cause came on regularly for hearing at this time upon demurrer to complaint and was submitted without argument; and thereupon, after due consid-



eration, it is ordered that said demurrer be and hereby is overruled, and defendant granted 20 days to answer.

Entered, in open court, December 7th, 1908.

GEO. W. SPROULE,

Clerk. [16]

---

And thereafter, on December 10, 1908, the Answer of Defendant was duly filed herein, being in words and figures following, to wit: [17]

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

THOMAS C. CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO. (a Corporation),

Defendant.

**Answer.**

Comes now the above-named defendant and answering the complaint of the plaintiff herein on file admits, denies and alleges as follows:

I.

Admits the allegations of paragraph one of said complaint.

II.

Admits that defendant had, in the usual and customary operation of its railway, maintained and used in and about the vicinity of its station at Butte, Montana, a system of parallel tracks and that on

November 17th, 1906, and for a long time prior thereto it was and had been constantly moving engines and cars thereon. Admits that on said date, while plaintiff was attempting to cross the system of tracks referred to, the wagon in which plaintiff was riding was struck by one of defendant's engines and plaintiff was thrown therefrom.

III.

Save as is herein specifically admitted or denied, defendant generally denies each and every allegation and all the allegations contained in plaintiff's said complaint.

Defendant further answering and for a first separate defense to the alleged cause of action stated in plaintiff's complaint alleges: [18]

I.

That the injuries, if any sustained by the plaintiff as set forth in his complaint, were due to and proximately caused by his own contributing fault and carelessness.

WHEREFORE, having fully answered, defendant prays judgment for its costs herein expended.

WM. WALLACE, Jr.,  
JOHN G. BROWN,  
R. F. GAINES,  
Attorneys for Defendant.

State of Montana,  
County of Lewis & Clark,—ss.

Wm. Wallace, Jr., being first duly sworn, upon oath deposes and says:

I am an officer of the defendant corporation, to wit, its Division Counsel for the State of Montana,

and as such make this verification for and in its behalf; I have read the foregoing answer and know the contents thereof, and the same is true to the best of my knowledge, information and belief.

WM. WALLACE, Jr.

Subscribed and sworn to before me this *this* 9th day of December, 1908.

[Seal]

R. F. GAINES,

Notary Public in and for Lewis and Clark County,  
Montana.

[Indorsed]: Title of Court and Cause. Answer. Filed Dec. 10, 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [19]

---

And thereafter, to wit, on December 23, 1908, plaintiff filed his Reply herein, being in the words and figures following, to wit: [20]

*In the District Court of the United States, Ninth Circuit, District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO. (a  
Corporation),

Defendant.

**Reply.**

The plaintiff replying to the answer herein alleges:

1. Denies the allegations contained in paragraph one of the defendant's first separate defense.

Wherefore, plaintiff having fully replied demands judgment as in his complaint.

A. C. McDANIEL,  
Attorney for Plaintiff.

State of Montana,  
County of Silver Bow,—scilicet.

Thomas Clark, being first duly sworn, says: That he is the plaintiff named in the foregoing reply, that he has read said reply and that the same is true.

THOS. CLARK.

Subscribed and sworn to before me this 22 day of December, 1908.

[Notarial Seal] A. J. ROSIER,  
Notary Public in and for Silver Bow County, Mon-  
tana.

Service of the foregoing reply acknowledged and copy received December 23d, 1908.

WM. WALLACE, Jr.,  
JOHN G. BROWN, and  
R. F. GAINES,  
Attorneys for Defendant.

[Indorsed]: Title of Court and Cause. Reply.  
Filed Dec. 23, 1908. Geo. W. Sproule, Clerk. By  
C. R. Garlow, Deputy. [21]

And thereafter, to wit, on June 6, 1911, the Verdict of the Jury was duly filed and entered herein, being in words and figures following, to wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Montana.*

No. 836.

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at the sum of \$780.00.

FRANCIS D. JONES,

Foreman.

[Indorsed]: Title of Court and Cause. Verdict. Filed and entered June 6, 1911. Geo. W. Sproule, Clerk. [22]

And thereafter, to wit, on the 8th day of June, 1911,  
Judgment was duly rendered and entered herein,  
being in the words and figures following, to wit:

*In the Circuit Court of the United States, Ninth Cir-  
cuit, District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COM-  
PANY (a Corporation),

Defendant.

**Judgment.**

This cause came on regularly for trial on the 5th day of June, 1911, A. C. McDaniel, Esq., and Messrs. Walsh & Nolan appearing as counsel for plaintiff, and Messrs. Wallace, Brown and Gaines appearing as counsel for defendant. A jury of twelve persons was regularly impaneled and sworn to try said cause, whereupon witnesses on the part of the plaintiff and on the part of the defendant were duly sworn and examined. After hearing the evidence, the arguments of counsel and the instructions of the court, the jury retired to consider their verdict and subsequently returned into court, and, being called, answered to their names and say they find a verdict for the plaintiff and against the defendant and assess the plaintiff's damages at Seven Hundred and Eighty Dollars (\$780.00).

WHEREFORE, by virtue of the law and by reason of the [23] premises aforesaid, it is or-



dered and adjudged that said plaintiff do have and recover of and from said defendant the sum of Seven Hundred and Eighty Dollars (\$780.00) with interest thereon at the rate of eight per cent (8%) per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, taxed at \$52.70.

Judgment entered this 8th day of June, 1911.

GEO. W. SPROULE,  
Clerk.

Attest a true copy of Judgment.

[Seal] GEO. W. SPROULE,  
Clerk.

By C. R. Garlow,  
Deputy Clerk.

United States of America,  
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 8th day of June, A. D. 1911.

[Seal] GEO. W. SPROULE,  
Clerk.

By C. R. Garlow,  
Deputy Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed and entered June 8, 1911. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on August 8th, 1911, a bill of exceptions, duly signed, settled and allowed, was filed herein, being in the words and figures following, to wit: [25]

*In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY (a Corporation),

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, that the above-entitled cause came on regularly for trial, upon the complaint, answer and reply, in the above-entitled court, sitting with a jury duly empaneled and sworn to try said cause, upon the 5th day of June, 1911, at ten o'clock A. M., whereupon the following testimony, and none other, was introduced:

**Plaintiff's Case.**

**[Testimony of Thomas Clark, the Plaintiff.]**

THOMAS CLARK, plaintiff, sworn, testified as follows:

**Direct Examination.**

My name is Thomas Clark, am sixty-eight years old. At the time I sustained the injuries, the subject of this action, I must have been sixty-four,—that is four years ago last fall. I was then employed by the East Side Coal Company; the owner or man-



(Testimony of Thomas Clark.)

ager of that Company was J. F. Swango. I had been employed by it four or five years,—not steadily, but good part of the time,—as teamster. Before that I worked as a stationary engineer in Butte. I went to Butte in 1892. I had crossed back and forth over there where [26] I was hurt for several years before I was hurt, in the city of Butte. Going right through the eastern portion of their yard, which is four blocks northeast of the Butte, Anaconda and Pacific depot. Where this crossing road cuts across there is six parallel tracks, some of them are further apart than others. A number of coal companies have their sheds there along these tracks, their coal is stored in them. This shed of the East Side Coal Company was about two blocks east, and on the south side, from the particular point where I was injured; I would say about 800 feet. This road goes across from Platinum to Aluminum Street, and crosses those tracks, and where it crosses there was planking between the rails. It was crossed every hour of the day, and several times an hour, by somebody. It is used in the movement of coal from the coal sheds. They all of them cross there, every-one of them cross there; in fact, it is the only way to get out without going around a considerable distance. I don't know when there wasn't a crossing there, I have crossed back and forth there myself for a number of years, I would say I had crossed there myself twelve or fifteen years to date. During the four or five years I worked there, sometimes I went across there a half a dozen times a day; other

(Testimony of Thomas Clark.)

times not more than once or twice. During those four or five years, it has been used by the public in general. It is a regular wagon road leading up to those crossings. I have seen the section crew put in and repair the planking, whenever the planking needed putting in there, I have noticed them there at different times; I couldn't say how often. Going from the end of the six tracks on one side to the other end would be about 300 feet. [27] On the 11th day of November, 1906, the day I was injured, I was driving a coal wagon for this company; I was crossing the track there, just about eleven o'clock. Well, I don't remember just where I had been; I had delivered a load of coal up somewhere, up in town, and was going back to the shed. I had a team and coal wagon. The bed is about eleven foot, of course, the wagon and team would be probably between eighteen and twenty feet, I would think. I was going south, down to the shed after another load of coal. I crossed two of the six tracks before I got to this crossing where the accident occurred. I saw them backing in a string of cars,—and engine. I was on the north side of the crossing when I saw them backing up there, and I stopped and waited for them to pass; they were going west, backing in west, a short distance east of the crossing. The distance between the second and third tracks is somewhere between fifty and sixty foot, where the road goes. After I crossed the second track, and was going toward the third track, south, I saw the train coming, and I stopped and waited for them to back in over the

(Testimony of Thomas Clark.)

crossing. When I stopped the team I was twelve or fifteen feet from the third track. After they had crossed, I started to go across, they went just a short distance and stopped, and I went on across,—supposed I was going to have time to get across; and when I got on the third track, why, they started up and ran into the hind end of the wagon.

Q. How long had you stopped the team there between the tracks?

A. Well, but a very short time, probably not more than two or three minutes, long enough for them to pass over the crossing. There were three or four box-cars attached to [28] the engine. They were stopped and standing still when I started to cross the track, and the engine was about twelve or fifteen feet from the crossing. I saw that they were coming right onto the wagon; I saw them coming ahead, but they were so close to the wagon that I had no time to do anything. There was no ringing of the bell; there was no signaling of any character, that I saw. I have no knowledge of anything after the wagon was struck, I was unconscious. It was the engine that hit the wagon. I am not sure whether it had any cars attached to it when it struck my wagon; my impression is that they hadn't. This was an ordinary coal wagon; when it was hit, I was sitting on the seat. When I recovered consciousness, I was in the Northern Pacific freight office, from four to five hundred feet from the crossing where I was struck. My head was pretty badly cut up here (indicating to the jury). Don't know

(Testimony of Thomas Clark.)

how it was that I got to the freight office. I was not attended by any doctor while in the freight office that I know anything about. After that I went to the Murray Hospital. I was in the hospital constantly thirty-three days; I went there to be treated every day for two or three weeks, besides what I was in the hospital.

Monday, June 5, 1911, 2:00 o'clock P. M.

I was put under the influence of chloroform, and my head operated on, by Dr. Larson. I suffered plenty of pain, I didn't go back to work at once; I wasn't able to work; in fact, I left the hospital before they quit treating me; the wound wasn't entirely healed when I left the hospital. I paid, on account of my treatment there, \$218.00, including doctor's bills, nurse's bills, and other bills. I went to work again after this injury, the first of March, 1907. [29] I didn't go to work before, because I wasn't able to; in fact, I wasn't able to go to work when I did go to work. I went back to work for the same company, at the same kind of work, and continued at that same kind of work thereafter steady all that summer up until the fore part of the winter, and then I laid off a while through the winter, because work was slack, and I didn't feel like working through the cold weather, any way. After I went back to work again, there was no particular pain, just a weakness,—that was all; I wasn't strong by any means, and able to go in and do a day's work like I was before. I had a headache at times, and do yet. Sometimes it is very severe, so as to make me pretty sick, I have no



(Testimony of Thomas Clark.)

recollection of having them before. I was healthy; I never have had to go to a physician before the injury, since I was grown up. I was getting \$3.00 a day before, and I got that wages when I returned to work in March, though I don't think I earned it. (Witness identifies Diagram, Plaintiff's Exhibit "A.") The tracks represented on this diagram are that yard over there, and the track where I was injured. These lines marked "B," "G" and "F" and "A," represent the tracks on the south side of the N. P. yards; this is all the north side here,—south side over here (indicating). The track on which I was injured is marked "A." This roadway is this line "I-Y," as shown upon this map; the "X" there, must be the crossing; that is the only thing that I could see that it was for. At the time the engine backed up with the cars, I was on the north side. At the time I stopped, I was just on the north side of this track (indicating), about fifteen or twenty feet. The engine was standing twelve or fifteen feet from the crossing, which would be right here, pretty close to the switch, where the [30] two tracks branch; at the mark "M," the crossing planks were about sixteen foot long. I am pretty nervous all right; was not before.

#### Cross-examination.

This set of tracks I spoke of was a part of the railroad yards of the Northern Pacific, in Butte, and had been while I worked there; drove the coal wagon; and these tracks shown on the Exhibit "A," are a part of those yard tracks; and the coal sheds spoken

(Testimony of Thomas Clark.)

of, lay along some of these yard tracks. The cars would be unloaded into the sheds; and would be taken out to the proper track or tracks, along the sheds, by the switch engines, which worked in placing cars opposite these coal sheds, in that part of the yard. The switch engine, instead of a slated pilot,—had steps on the front,—a footboard; and another one at the rear, footboard; you could tell them from a passenger engine in that way. The switchman would stand on that while they were running about the yard. This particular engine, running there that day, was a switch engine. It was facing east, so that when it stopped after backing down west, the front of the engine would be facing the crossing. This switch on the sketch, Exhibit "A," is where the tracks divided; it was one track down to the point "M," and there it split into two. One of these tracks after so splitting is marked "B," and the other is marked "C." This switch-stand at "M" was the point at which the switch lever was thrown to let anything coming down this north track out onto one or the other of the two divided tracks. I was driving on the north side of the track, and the road inclines to the east of south, as you go, toward the track; and the sketch shows about the inclination, so that as you approach the track, my head was turned rather in an easterly direction, generally speaking, [31] toward the south, but slightly to the east. The road crosses this track, on which the switch engine was moving, where the planking is. I was going over where the planking was, in the cen-

(Testimony of Thomas Clark.)

ter of the planking, as close as I can get to it, the planking was about sixteen feet wide. My wagon was a standard width lumber wagon width, somewhere in the neighborhood of seven feet, that is, the wheel tracks, so that there would be about four and a half feet of planking on each side of the wagon. This track on which this switch engine was then moving, was for switching cars to these other tracks, shown in the sketch. When I first discovered the engine, I was between the track marked "A" and the track next northward. The engine, then, was down just a little east of the crossing here. The cars was west of the engine, headed east. I was driving a team; alone in the vehicle. No cars had got to the crossing when I stopped, the cars passed in front of my team as I stood there. I had come to a stop to let the switch engine and cars go by. Was standing still during the time the switch engine and cars passed over this crossing; the heads of the horses were within about twelve or fifteen feet of the track. My team continued to stand in that position until the switch engine had crossed over the crossing. When the engine was coming back toward my wagon, I *though* there were no cars then attached, because they had backed in there and started out so quick, I naturally supposed they must have left them in one of those two forked tracks, coming out at the point "M." My estimate of the distance the engine was, or train was, from the crossing is an approximation. I had no means of marking the spot; I didn't particularly notice it either. When I

(Testimony of Thomas Clark.)

spoke of that distance, I meant the distance from the end of the planking [32] to the front of the engine. I think there was a space something like twelve or fifteen feet between the end of the engine—the front end of the engine and the planking; that might have varied somewhat, how much, I would not say. I drew the inference that they had left those cars because they started back so quickly.

Q. I believe you have stated that they stayed there but an instant?

A. Well, long enough so that I started to go across. At the time the engine struck the rig, I think the hind wheels was just about—well, probably pretty near the south rail; the wagon had crossed over the north rail, and was either about the south rail, or at some point between the two rails. I was sitting at the forward end of the wagon; the bell was not ringing, at no time. I can't tell how far east of the crossing the nearest end of the cars were, at the time when I stopped with my horses' heads twelve or fifteen feet from the crossing, they were close enough so I didn't consider I had time to go across; I would say about forty feet. After first observing them, until I came to a stop, I did not drive more than fifteen or twenty feet.

#### Redirect Examination.

After the engine went over the crossing, and before I was struck, it couldn't have been more than a couple of minutes; I just had time to drive on there and was about two-thirds of the way across.



(Testimony of Thomas Clark.)

Recross-examination.

It was the length of time it took me to drive from where my horses were standing at the time the switch engine passed west and reach the point where the engine struck the rear of my wagon.

(Examination by the Court.) [33]

Q. Did you see the engine moving after it came to a stop backing the cars?

A. I saw it just about the time it did strike the wagon, not before.

**[Testimony of J. M. Swango, for Plaintiff.]**

J. M. SWANGO, on behalf of the plaintiff, testified as follows:

Direct Examination.

My full name is J. M. Swango; I have lived in Butte thirteen years; I was the owner of the East Side Coal Company in 1906, and had been since the first of June of the same year. I know these yards where this accident occurred, I guess about nine years I have known them. My sheds were about six to eight hundred feet east, on the south side of the N. P. tracks, on the B. A. & P. tracks. Those tracks there on Exhibit "A" are approximately correct; of course, these may not have the same curves in them, but that is about the location. The yard there is level ground. There is a fence runs down on one side of it, and enclosed the Big Blackfoot Lumber Company's yard, outside of that it is open. There is coal sheds there, several of them, several warehouses; the old N. P. freight depot is on there too. There is a road crossing there, used by anyone

(Testimony of J. M. Swango.)

that wants to go up and down through there; always in condition for heavy hauling or for driving. It is used altogether by every coal dealer in town, I guess, to deliver his goods over that. I came to Butte thirteen years ago and went to work driving a furniture wagon up and down there. From that time on down to the present time it was used about the same, I should judge. This roadway is here on the map, running from "I" to "Y,"—it crosses them yard tracks where the road crosses the tracks, it is planked, all the tracks. This planking [34] has been placed and maintained by the railway company. I had known Clark about eight years. He had been working for me about five years before that. When I first went into the coal business, he drove the first team. My coal sheds do not show on this map. Between my coal sheds and this crossing there is no obstructions at all. He was working for me the day he was injured; when the collision took place, I was right at the west end of my sheds. Just before the collision, I saw him, he was just stopping as I saw him, on the north side of this track "A." He was right in the road at that time, there was a switch engine going west on the south side of him, in the direction of that crossing. There was cars on it, I don't know just how many; they passed the crossing, I could not tell how far. I saw him just start to drive up, the engine was past the crossing, the team was between me and the engine; I could see that. At that time, I could not tell whether the engine had got to a standstill, or whether it was still

(Testimony of J. M. Swango.)

moving east. I heard someone remark that a team was hit up there. I was up there in not to exceed five minutes. The wagon was upside down, part of it, and the horses over across on another track, up against the coal sheds. I did not see the plaintiff at that time, or the engine. The wagon—one hind wheel was all mashed up, and the front wheel—and I think there was maybe a couple of spokes and a bolt knocked out of it; the box was clear out of it; one hind wheel was broken and one front wheel was damaged. I saw Clark that afternoon in the N. P. freight house. The accident occurred around eleven o'clock, somewhere. Around two or three o'clock; I don't remember the exact time I went up there. He had a rag tied around his head; it was still bloody. He wasn't [35] exactly conscious, but still he knew me when I went in. I took him from the freight office. He received medical treatment that afternoon at my house, from Dr. Larson. He was taken to the hospital twelve hours after the injury. I visited him there every two days. His head was a very bad head, swollen, terribly swollen, tied up, bandaged. It was swollen until after he got out of the hospital. It was very evident that he was awfully sick. This swelling extended all over his face; the whole side of his head it was all bruised up. He went to work about the first of March, next year; he couldn't do a day's work. He worked two years and a half.

Q. And do you know why it was that he finally quit working for you?

(Testimony of J. M. Swango.)

By Mr. WALLACE.—I object to that on the ground that the witness has stated that he worked two years and a half, and the period of impaired earning capacity is fixed by this pleading up to March *the following*, and no impaired earning can be showed after that time.

By the COURT.—The objection is overruled; defendant's exception noted.

A. Why, on account of this hard work, to get lighter employment for him.

During the time that he worked for me he was very nervous, and evenings very weak, his condition before he was injured, as compared with his condition afterwards, there was a great deal of difference between them. He was always a husky, good, hard worker, and after his injury he wasn't the same man by any means.

#### Cross-examination.

It was eleven o'clock in the morning, a sunshiny day. The track was clear from where I was standing to where the [36] plaintiff was standing; the buildings there did not effect the view at all. The fence of the Big Blackfoot Milling Company yards was a board fence, due north of him; he was almost due west of me. He was about the east end of the fence; the fence was the south line fence of the Big Blackfoot Milling Company's yards.

#### Redirect Examination.

This crossing was at grade.

#### Recross-examination.

What I meant by grade crossing, is the regular

(Testimony of J. M. Swango.)

traveled road, with plank over it between the railroad tracks. It was just this wagon road, with this railroad track on which the collision occurred.

Plaintiff offered in evidence Rule 230 of the book of rules. (Admitted.) Reading:

“The engine bell must be rung as the engine is about to move.” And the fore part of 231 I desire to offer in evidence.

By Mr. WALLACE.—I object to that as immaterial.

By the COURT.—Objection overruled; defendant’s exception noted.

Rule 231 reads:

“The engine bell must be rung on approaching every public road crossing or grade crossing, and until it is passed.”

By Col. NOLAN.—The plaintiff rests.

By Mr. WALLACE.—I will make an objection on the ground that the proof does not show that this was a public crossing.

By the COURT.—Objection overruled; defendant’s exception noted.

### **Defendant’s Case.**

[**Testimony of David E. Garland, for Defendant.**]

DAVID E. GARLAND, called, sworn as a witness of [37] defendant, testified:

#### **Direct Examination.**

I live at Tacoma, Washington. Am assistant yardmaster for the Chicago, Milwaukee & Puget Sound Railway Company. Remember the occasion of this



(Testimony of David E. Garland.)

accident, I had charge of the switch engine; I was employed as engine foreman; or foreman of the crew which works with the engine. That crew consists of two helpers, myself, the engineer and the fireman. Just before this accident, we were engaged in weighing one car, and putting it into the Great Northern transfer, upon a track whereat there was scales, west of this crossing. The head block of the Great Northern transfer was west of the crossing. The first switch westward of the road crossing on which the team was traveling, is at the point marked "M" on the map, that opens the track for the receiving and delivering to the Great Northern Railroad. This track scales were located on No. 1 track, No. "B" here. Had hold of one car, had weighed it, and after weighing it, come down headed east over the switch, next west of the crossing, just barely went over the crossing. I had a field man and an engine follower; my man following the engine dropped off at the switch, and I cut the car off at this switch "M." The switch-stand was on the south side of the track. My engine follower was at the switch-stand, he had opened the switch; I was riding the rearmost foot-board, on the rear of the engine-tank; I intended to cut the car out and kick it in, or start it back; the fieldman was riding it in, in order to stop it on the transfer at its proper point. After this switch at "M" was closed to the track I had come out on and opened to the transfer; I gave the engineer a kick signal to kick the *the* car back into the Great Northern transfer; I also gave [38] a go-ahead signal. I was

(Testimony of David E. Garland.)

facing him on the south side; he was looking back at me—on the south side looking back. On receiving that signal, he took the signal and kicked the car; he pulled the engine open,—gave the engine steam,—and the car naturally went west as far as it could go, after it got under headway, I gave him a signal to go ahead. I gave the signal to go ahead with one hand, and uncoupled the car with the other hand, and he reversed the engine so that the engine started the other way. I knew nothing of the accident until I seen Mr. Clark lying on the ground. The moment our engine hit the wagon, the engine came to a stop, and we saw this man lying on the ground. I went to the freight office as fast as I could and notified a doctor and the agent, Mr. Mc-Millan, there. The injured man was taken to the freight-house by the two helpers on the engine. After the engine, on your signal, started to back west with this single car, to kick it in, did it come to a stop at all before it went the other way?

A. Well, of course, momentarily, not any longer than that. When I gave the signal to go ahead, he had barely cleared the street crossing; the bell was ringing all of the time.

#### Cross-examination.

The engineer was Mr. Casey; the fireman was Charley Olsen. I left the employ of the Northern Pacific, October 19th, 1908. Had been foreman of the yard crew, before this injury occurred five years,—since October 3d, 1903. Just before we got to this crossing, we started from the scales on this track



(Testimony of David E. Garland.)

“B” here; the engine was headed east and the car was on the west end of it, behind it. When we pulled off the scales I was facing east,—facing the engineer, and on the footboard between the rear of the engine and the [39] car, we went over the switch far enough to throw it. We came on the crossing, but not across it. From the crossing to the point where the switch deflects is about one hundred feet. We desired to place the car on track “C,” the receiving track of the Great Northern; the car was behind the engine all of the time,—on the west end of the engine.

Q. In sending the box-car back into the switch, the engine came back how far?

A. I should judge fifty or sixty feet,—seventy feet, probably. I said the engine and car was on the crossing, yes, sir, but not over the crossing. At the time I came to a standstill on the crossing, before there was any backing up of the car at all, the engine was completely over the crossing, but the car was on the crossing; it may be that the footboard of the engine was about on the extreme east end of the crossing,—that is, the footboard of the tank; you would have got east a car-length to give us room to throw the switch. They don’t stop the engine, you know, just right at the time you give the signal; they can’t stop immediately; they run a certain distance, perhaps a car-length. I didn’t see the plaintiff when he was injured or before. The bell was constantly ringing. The switch was turned by the man following the engine; he was on the footboard

(Testimony of David E. Garland.)

with me, until he got off; his name was Ed. Willett. I don't know where he is now. After he turned the switch, I gave the signal to the engineer, who was on the right-hand side, same side as the switch-stand; I took the pin out to uncouple the car from the engine; did not get on the ground to do that. When I gave him the kick signal, he put on a big head of steam, and started west at perhaps four miles an hour. I still kept on the footboard; didn't get off at all; the engine went a distance of about fifty or sixty feet. I [40] gave the signal to go forward, after I had the car cut off.

Q. And he got off the crossing, did he, or do you know?

A. I am not positive, but if he did he barely cleared the crossing. The engine came to a standstill, you might say, momentarily; he put the engine over on a full; he reversed her from back up to go ahead almost under a full head of steam; it would be just momentarily. I don't know whether the engineer saw this man there with a wagon, or not. I didn't get off the footboard at all until we came up and found this man. I was standing on the right-hand side, on the end. After we weighed the car, the fireman started to ring the bell, and continued to ring it until after this accident happened. The engine was going at the time that it got to the crossing, when this collision occurred, three miles an hour; he had just got the engine over and made a couple of exhausts. There wasn't any noticeable stopping of the engine at all.

(Testimony of David E. Garland.)

Q. It would have to stop to go back and then forward? A. Yes, sir.

When I seen the blood coming out of his head, I made right for the freight depot, to make a report and notify a physician. I notified the agent, and I heard him notify Dr. Campbell. I saw the plaintiff brought into the freight-house on Arizona Street. The wagon wouldn't stop that engine, hardly; the engineer stopped the engine as quick as he ascertained there was trouble ahead. The engineer could have seen the crossing from the cab of his engine.

Redirect Examination.

Q. Mr. Garland, could the engineer, from his position on the seat box in the cab, see over immediately on the left side of the engine at the crossing?

A. No, sir. The left side would be the north side. I pulled the pin not when I gave the first signal to kick [41] back, but when I gave the second signal to go ahead.

Recross-examination.

I said I pulled the pin with my left hand and gave the signal with my right hand.

Q. You said to Mr. Wallace that as the engineer was there close to the track, and being on the right side of the engine, that he could not see across *across* on the other side and see the wagon there?

A. I did not.

Q. Well, how far back from the crossing would he have to get so that he would be able to see a wagon within ten or fifteen feet of the track?

(Testimony of David E. Garland.)

A. He would have to be back about eighty feet, clear of the crossing,—about two car-lengths.

**[Testimony of William Casey, for Defendant.]**

WILLIAM CASEY, sworn as a witness of defendant, testified as follows:

Direct Examination.

My age is twenty-eight; business, locomotive engineer. Live at Livingston. On the occasion of this accident, I was running that switch engine; Charley Olsen was my fireman; since I have seen him is about three of four years. My switch foreman was Mr. Garland. Immediately before the accident, was weighing a Great Northern Car, on the scale track in the upper yard; had just the one car. After weighing it we went east having engine and the one car. The switch foreman was on the hind footboard between the tank and the car. I took all the signals from him, in the forward movement; went east on the Great Northern switch there. The tank just about got over the east wagon track on the crossing; the car was still on the crossing; stopped on the foreman's signal; the engine bell had been ringing prior to stopping. [42] After thus stopping, I waited for a signal from the foreman to back up. The signal told me to kick the car, otherwise, to give a full head of steam. I came forward eastward with the engine; I did not see anything of the plaintiff of the wagon or team he was driving. On receiving this signal from the switch foreman to kick back, I put it in backward motion and gave her



(Testimony of William Casey.)

steam; the effect of that was to back. I backed west of the crossing. When I stopped it just about cleared the west wagon track of the crossing,—not over a foot. I didn't go farther on westward, because I got a stop signal from the foreman. He was on my side on the back footboard,—the right side. After receiving this stop signal from the switch foreman, I received a go-ahead signal, after I kicked back, and I reversed my engine, and with the effect of that, I started ahead with a forward motion; the car kept going back. The head switchman was on the car that ran back, and one at the switch. This switch was on the south side,—right side. It came to a stop as the result of my changing the lever, I should judge a second, and then started eastward again. Down to this time I hadn't seen anything of plaintiff, or his wagon or his team. The fireman had just got down to put in a fire,—that is, down on the deck. The act of throwing the lever over would cause the bell to ring for probably a minute or a minute and a half, because of the sudden jar of the engine, the sudden starting up on reversing. The first I saw was the horse that went ahead of me; I saw it right ahead of the engine, so close that I couldn't stop; I done everything I could to stop; the horses came into sight, south of and about right under the boiler. In my effort to stop I reversed the engine and gave her a full head of steam, and gave her all the air I could. [43]

Q. Was there anything more you could have done?

A. No, sir. I hit the wagon then. Myself and

(Testimony of William Casey.)

fireman and the switchman went down and picked him up and put him in the engine, and took him up to the freight depot. When I put him in the switch engine, I asked him what he was trying to do; he said he did not think I was so close to him. The day was clear and daylight. When I last saw Clark they were taken him out of the engine at the freight-house. I examined the place of the accident and the tracks of his wagon after the collision; after I took him to the freight-house I came back and examined the ground and the tracks, and the wagon track showed a circle away from the engine and east of the crossing,—that is, toward the east, but on the crossing. There was one wheel wagon track off the track east of the crossing,—of the wagon crossing; they were curving toward the east.

#### Cross-examination.

The engine bell was ringing at the time of the collision; and it was due to the fact that I suddenly reversed the engine.

Q. And that was what caused the ringing of it?

A. No, sir. It would cause it, but it didn't cause it then; the fireman was ringing it; he pulled the bell, and when you pull the bell it will ring two or three minutes of its own accord.

Q. When did he pull the cord before that?

A. Going both ways over the crossing. In going west over the crossing he started to pull that bell four or five times; he rang it when we got to the scales; and we weighed the car and started off the scales, and he started ringing the bell; he was con-

(Testimony of William Casey.)

stantly pulling the cord after we left the scales, [44] and when we got over the switch and backed down and kicked that car the bell was still ringing; and when I started to go east, he went down to the fire, and when I stopped it was still ringing; it was ringing all the time, only when we were weighing the car. From the scales to the crossing is,— perhaps, 100,— 125 feet. The bell was constantly ringing over every crossing, it did with me. As I got within about 100 feet from the crossing, I looked to see whether there was anything on the crossing, or beside the crossing. If there was a man with a team about ten or twelve feet away from the track, I could have seen him, if on my side, yes, sir. As I looked out of the cab window, a distance of eighty feet ahead, could see a wagon on either side of the crossing; there wasn't anybody there. In going to a crossing I am always careful, lest there might be somebody on there; that crossing was known to me, as being generally used. When I was within eighty feet of the crossing, I didn't see any wagon; I am sure that I looked. A team could go quite a ways from the time you would go eighty feet up this way, reverse your engine, kick that car back, and reverse your engine and start it this way again. At a short distance, within eighty feet, I would have some difficulty in seeing the wagon, if on the fireman's side. The fireman could see the wagon to an inch if he were looking out. Unless the fireman was looking out for a distance of eighty feet, going toward the crossing, I could not protect a fellow who was cross-



(Testimony of William Casey.)

ing there, at all. Would have to depend upon the fireman to advise whether any person was getting upon the track; the fireman didn't tell me there was any wagon standing there. I hadn't made any examination of that ground before that day, before eleven o'clock. You could tell whether there was another wagon went by there or not; the way this wagon laid, no wagon could [45] come in there to make the track. It had to be between the rails; it went over the rails, and off the crossing. I didn't see the wagon at all until I was just going to strike it. When I did see the wagon, the horses were just over the rails; the front wheels of the wagon were just about on the rails. I struck the wagon very close to the center. I seen Clark on the ground first. At the time I got the signal to go ahead, the front footboard of the engine cleared the wagon track, perhaps a foot,—not much more. The front footboard of the engine was about a foot west of the west wagon track on the crossing. Whether anybody was going over that crossing, I could not see. The fireman was putting in the fire. I could see on my side, could see that there was nothing on the track, unless somebody drove right up around the front of the engine. If they started to go ahead, right in,—cross right ahead of me; you couldn't see them until the horses got on the south rail. The crossing was not clear; I was occupying the crossing at the time; I didn't clear the crossing. After I started on the reverse, before I struck the wagon, I didn't go but a very short ways; I don't believe I went over

(Testimony of William Casey.)

thirty feet,—twenty-five or thirty; I had no more than put my engine over when I hit the wagon. My engine had to come to a standstill, and in moving forward, I knew I was going to go; I had struck a speed, when I struck the wagon, between three and four miles an hour; after I struck the wagon I didn't go over ten feet. It takes time to stop a light engine. With the application of all the stopping power you had, you couldn't stop it in less than ten feet. You haven't got an awful lot of braking power on an engine, without any cars behind it, like you have with the cars behind it, with the air. From the road crossing to the switch-stand was about fifty or sixty feet. My purpose [46] in examining the wagon track was just to see where he went. We have to make out our Form 31, whether we hit him on the crossing, or whether he was off the crossing. I made the report that he was off the crossing practically. The fireman was there and looked over the ground with myself. When I came along on this scale track with this box-car behind the engine, I saw the crossing then, and looked at it, and kept looking at it until we were within eighty feet, when I could not any longer see it. The engine went over the crossing, then I got a signal to back up. The switch tracks have a little grade, not very much. You would have to cross another switch from this track before you got on the track of the Great Northern, before you could kick it in over there and clear. I gave it a kick sufficiently strong to get it back there. Had a wild idea of the distance; I kicked several

(Testimony of William Casey.)

cars in there. We didn't get very far from the switch-stand, maybe a foot or a foot and two inches from the west wagon track of the crossing. I don't know just exactly how far it is from the crossing to the switch; I can see it on my side. You couldn't see the horses coming from the other side, until they got on a direct line with the side of the boiler,—you couldn't look around the curve of the boiler and see them coming; you could see it when it got opposite the rail, not before, if they was close to the engine, perhaps five or six feet. Am working for the company now, have been continuously since this accident; am running a freight engine on the main line.

**[Testimony of S. C. Ashby, Jr., for Defendant.]**

S. C. ASHBY, Jr., sworn as witness of defendant, testified as follows:

Direct Examination.

I am the claim agent stationed here. You requested me to look up the rumor about the presence of the fireman. [47] I went to the roundhouse foreman this morning, and the time-keeper, to find out if here was a man in the employ of the company here by the name of Charley Olsen, and as near as I could find out, he had not been around here for two years.

Cross-examination.

Q. Where was it that you got the information that Mr. Olsen was here?

A. Mr. Wallace told me this morning. The only

(Testimony of William Wallace, Jr.)

thing that I did in connection with this case was simply to hunt Olsen.

**[Testimony of William Wallace, Jr., for Defendant.]**

WILLIAM WALLACE, Jr., sworn as a witness of defendant, testified:

I am an officer of the defendant railway company,—its division counsel for Montana. I had to do with the preparation of trial of this case for the several occasions when it was necessary to get ready for trial. I have made earnest efforts on every occasion to get the fireman, Charles Olsen. I find that as early as November 29th, 1910, I called upon the General Counsel at St. Paul, to try and locate Charles Olsen, together with other witnesses, and to have him with other witnesses, report to my office on the afternoon of December 5th. I am using my file for a copy of the telegrams. I also find that I advised of the continuance of this case on December 2d, to the general claim agent, and that at that time I asked him not to let up on efforts to locate either Garland or Olsen, that at least one of these men would be needed, and I confirmed that by letter on December 17th last; as the result of that effort, I was advised and learned from the general claim agent of the defendant company, who is the source through which witnesses not available here, that cannot be located here, are sought for, that they had not been able to locate Charles Olsen, [48] and they doubted very much if they would be able to do so. On the 19th day of May of this year, I called

(Testimony of William Wallace, Jr.)

upon the division superintendent, who undertakes to look up witnesses needed for trial where they are locally available,—the division superintendent of this division,—and I called then for witnesses, among others the fireman, Charles Olsen; and on the 20th of May I was advised by the division superintendent that one of the witnesses called for would report, and that fireman Olsen was out of the service and his whereabouts unknown, and the whereabouts of another witness was given. And because I had been unable to secure him by efforts locally, on the 26th of May of this year I again wired the general claim agent at St. Paul, asking him to furnish one of the witnesses shown to be by the division superintendent out of the state, and asking him also to endeavor to locate fireman Olsen and produce him at the trial. I was not able to get any results at all, and as soon as I heard this rumor spoken of here on the stand, as to the possible appearance of Olsen in the State, I at once made an effort to investigate that, and with that result.

#### Cross-examination.

I don't know of anything more that I could do; I exhausted my resources, so far as I know, Colonel. Garland, I got as explained, got his address through the division superintendent. The information that Olsen had strayed into town, I think I got the night before last, from Mr. Garland, who had heard Mr. Casey say so.

Q. But you didn't move the agencies to locate him until this morning, did you?



(Testimony of William Wallace, Jr.)

A. It was Sunday, and I could not reach the claim agent until this morning. [49]

**[Testimony of John Oies, for Defendant.]**

JOHN OIES, sworn as witness of defendant, testified:

Direct Examination.

My home is at Livingston; am a civil engineer, in the service of the railway company. I got here from Butte last night. Was over there at your request about this crossing; had been over there about a week ago first. Yesterday I went to a road crossing, that just south of the southeast corner of the Big Blackfoot Milling Company's fence, that leads over the track there; it is about 600 feet southeast of the old freight-house. That scale track takes off about twenty feet from the center of the road crossing; there is planking at that road crossing. It is eight feet from the switch to the west end of the planking; this is the first switch west of that crossing. The planks there are sixteen feet. The distance down to the scales, of the scale track that runs out of that switch, from the switch to the scales, is 336 feet.

Cross-examination.

From the crossing to the scale track there is one track in between there; it is twenty feet from the center of the crossing. The track east of the crossing runs beyond the crossing; and the switch on which the scale is branches off that, about twenty feet from the center of the crossing. There are two tracks west of the crossing, and the farthest one



(Testimony of John Oies.)

north the other switch is taken off, but between the switch twenty feet west of the crossing, and the scale, there is no switch on the track. North of the scale track a switch is taken off of that track about one hundred feet west of the crossing, and running to the north of the scale track. The track east of the crossing runs quite a distance to the east; that is the only track there on which there are [50] any scales. From the switch to the scales is 336 feet.

Redirect Examination.

This northward track, I think, is a lead track. There is no switch taken off between the scales down here and the head block, that switch letting into the scale track. This other switch taken off about one hundred feet from the crossing takes off from this northernmost track, and goes in between the scale and the other. The switches taken off of the north track are both to the westward of the switch that splits the track for the scale track and the north lead.

**Rebuttal.**

[**Testimony of Thomas Clark, for Plaintiff (in Rebuttal).**]

THOMAS CLARK, recalled, testified:

Direct Examination.

When I stopped there to permit the train to pass, the train was east of this crossing. When I made the crossing there, my wagon didn't get off the planks; I didn't make any wheel marks off the planks and between the rails.

Q. There is also some evidence here that when

(Testimony of Thomas Clark.)

you were taken on the engine, after being injured, you made the statement, "I did not think you were so close."

A. It would have been impossible; I was unconscious and knew nothing about it.

Evidence closed. [51]

**[Motion for a Directed Verdict, etc.]**

Immediately upon the close of the evidence, defendant made and filed its written motion for a directed verdict, which motion is as follows:

"Comes now the defendant Northern Pacific Railway Company, at the close of all the evidence, moves the Court to direct a verdict in its favor, because the uncontradicted evidence shows that the plaintiff was guilty of contributory negligence proximately causing his injury, in this: That he knew he was in the switch yards of this defendant, was thoroughly familiar with the crossing, and the regulations of the switch immediately west thereof, knew that this was a switch engine, engaged in the work of moving cars within the yard, stopped beside the track to let it pass westward, saw it come to a stop within a very few feet of the crossing, and knowing, or in the exercise of reasonable diligence being bound to have known, that the switch engine, after stopping, might, whether it used this switch or otherwise, go again in the opposite direction, and without getting any signal to cross, or waiting to see which way the engine should start, or making any inquiries of anyone about the train, he starts to cross in front of the engine, and either does not observe to notice that

it has started back towards him, or observing it, endeavors to cross ahead of it, and is struck and injured; and that, at all of said times, the view was wholly unobstructed, and the engine constantly within his view, had he chosen to have looked.

## II.

There is no sufficient averment to warrant submitting the question of 'The last clear chance,' in that there is no averment that the striking of the wagon could have been avoided by the exercise of reasonable care, at any time after it was known he was either in or approaching a position of peril; or any averment that in the exercise of reasonable care, he should have been seen in peril sooner than he was.

## III.

There is no evidence to warrant submitting the question of the last clear chance to the jury, in that there is no proof that after he had started to cross the track, he was either seen by anyone in control of the engine, or who could have warned such person, until his horses appeared in the engineer's view on the track, or that in the exercise of reasonable diligence he should have been sooner seen; and the evidence is uncontradicted that thereafter everything was done that could have been done to have averted the accident, but without avail.

## IV.

The evidence shows uncontradictedly that the negligence of the plaintiff was operating to the very moment of the accident, in that he failed to watch the engine at all from the moment it stopped just west of the crossing, until just the instant before it

hit his wagon.” [52]

And after argument the said motion was by the Court overruled, to which ruling of the Court defendant then and there duly excepted.

**[Defendant’s Exceptions to Charge, etc.]**

Thereupon and in due season, defendant excepted to portions of the charge of the Court, as *give*, for reasons respectively as follows:

(1) To that portion on page 3 of the charge reading: “While it was incumbent upon the defendant company in running the engine forward, and in the direction of the plaintiff, to give warning of its approach by ringing the bell,” etc., and also that portion on page 4, reading, “whether the defendant was negligent in the respect charged in the complaint depends, under the evidence, on whether the engine bell was rung before the engine started,” etc., for the reason that under the facts of this case, there being a continuous switching operation to, past and back over the crossing, there was no such obligation. This objection was by the Court overruled and defendant duly excepted, and its exception was duly noted by the court in its minutes.

(2) To that portion of page 5 reading: “So the burden of proof to show contributory negligence on the part of the plaintiff is upon the defendant,” etc., because this case involves an exception to the rule above stated, in this, that the plaintiff himself started the team from a place of safety, and drove onto the track, and into a place of danger, and the burden was upon him to allege and show, that in so doing he acted with reasonable care. This was overruled and

defendant duly excepted and its exception was then and there, by the Court, noted in its minutes.

**[Instructions Requested by Defendant, etc.]**

The defendant duly requested in writing the following instruction, D-8: [53]

“The pleading in this case only charges that the accident could have been prevented by the exercise of reasonable care, and that the employees of defendant saw plaintiff’s peril. There is no allegation that in the exercise of reasonable care they could have sooner seen his peril than they did actually see him upon the tracks, if it was there they first saw him after he had started his team from the standing position north of the tracks, and for this reason also you will have nothing to do with the question of when they ought to have seen him in peril, but only when and where those in control of the engine actually did see him in peril.”

The Court refused the same, and defendant duly excepted to such refusal, because the offered instruction correctly stated the law material to the case, and it was not elsewhere given in terms or in substance in the Court’s charge to the jury; this exception was also duly noted by the Court in its minutes.

The defendant duly requested in writing the following instruction, No. D-7:

“Even if you find from the evidence that defendant’s engineer might, after discovering plaintiff’s peril by the exercise of reasonable care in the use of his appliances at his command, have avoided striking the wagon and injuring the plaintiff, nevertheless, if you also find from the evidence that the



plaintiff himself by a reasonably careful observation of the engine, either at the time or after he started to drive across the tracks in front of it, might have avoided injury to himself and avoided the collision or the injurious consequences thereof to himself, but that in fact he did not observe the engine after it had stopped [54] and until just about the moment it was striking his wagon on the crossing, though in the exercise of due care he should have looked at the engine to see which way it was going to move, and if it was going to move at all, then because this lack of care on his part was operating to the very last moment, the question of whether defendant could or could not have avoided striking plaintiff after discovering his peril would become immaterial and your verdict must then be for the defendant."

The Court refused the same, and the defendant duly excepted to such refusal, because the offered instruction correctly stated the law material to the case, and it was not elsewhere given in terms or in substance in the Court's charge to the jury; this exception was also duly noted by the Court in its minutes.

The defendant duly requested in writing the following instruction No. D-9:

"The plaintiff is not to be permitted to speculate or guess upon his chance of getting across before the engine would start back towards him, nor to speculate on whether the engine if it did start would start towards him or in the opposite direction. He was bound to assume that the engine might start at any moment, and if he speculated upon the matter and



without any inquiry of the train crew or any signal by way of invitation, he went on the track and was struck, then he cannot recover and your verdict must be for the defendant.”

The Court refused this instruction, and defendant duly excepted to such refusal of the Court, because the offered instruction correctly stated the law material to the case, and it was not elsewhere given in terms or in substance in the Court’s charge to the jury; and this exception was also duly noted by the Court in its minutes. [55]

The defendant duly offered in writing the following instruction No. D-10:

“Because wagons may be stopped quickly, a train or engine has the preference at a crossing. It is the duty of the person in the wagon to wait for the train, and exercise reasonable diligence in and about the crossing.”

The Court refused the same, and defendant duly excepted to such refusal, because the offered instruction correctly stated the law material to the case and it was not elsewhere in the Court’s charge to the jury given in terms or in substance; and this exception was also duly noted by the Court in its minutes.

Thereafter, and after argument by counsel, and upon being charged by the Court, the jury retired to consider of their verdict; on June 6, 1911, they returned the same in favor of plaintiff as follows:

(Here insert said Verdict.) See page 22.

Thereafter and on June 8th, 1911, the judgment was entered in favor of plaintiff and against the

defendant and in accordance with said verdict, in words and figures as follows:

(Here insert said Judgment.) See page 23.

And on June 6, 1911, by consent of counsel, the Court ordered that the time for preparing defendant's proposed bill of exceptions should be extended sixty days beyond the ten-day period prescribed by rule, or until August 14, 1911, inclusive, and here and now the defendant tenders the foregoing as its proposed bill of exceptions in the above-entitled action.

WM. WALLACE, Jr.,  
JOHN G. BROWN,  
R. F. GAINES,

Attorneys for Defendant. [56]

**[Order Settling and Allowing Bill of Exceptions.]**

And now on the 8th day of August, 1911, and within the time allowed by law and the orders of the Court, the plaintiff having announced that he did not desire to propose any amendments to said proposed bill as served, or desire any notice of the settlement thereof, and the same having been duly delivered to the Judge for settlement, and having been found correct, the same, consisting of the foregoing 31 pages, is hereby settled and allowed as and for a true bill of exceptions in this cause.

CARL RASCH,  
Judge of said Court.

[Indorsed]: Title of Court and Cause. Bill of Exceptions. Filed Aug. 8, 1911. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk. [57]

And thereafter, to wit, on October 4, 1911, defendant filed its assignment of errors herein, being in the words and figures following, to wit: [58]

*In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Defendant.

**Assignment of Errors.**

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, to wit:

I.

The Court erred in overruling defendant's objection made at the close of plaintiff's case to the failure of plaintiff to prove that the crossing where the accident occurred was a public crossing.

II.

The Court erred in denying defendant's motion for a directed verdict in its favor, made at the close of all the evidence.

III.

The Court erred in rendering judgment against the defendant and in favor of the plaintiff.

JOHN G. BROWN,

R. F. GAINES,

WM. WALLACE, Jr.,

Attorneys for Defendant.

Due personal service of within assignment of errors made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,  
WALSH & NOLAN,  
Attorneys for Plaintiff.

[Indorsed]: Title of Court and Cause. Assignment of Errors. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. [59]

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And thereafter, on Oct. 4, 1911, defendant filed its petition for writ of error herein, being in the words and figures following, to wit: [60]

*In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Defendant.

**Petition for Writ of Error.**

Northern Pacific Railway Company, defendant in the above-entitled action, feeling itself aggrieved by the judgment of this Court made and entered in the above-entitled action on the 8th day of June, 1911, in favor of the plaintiff for the sum of seven hundred and eighty (\$780.00) dollars, together with said plaintiff's costs and disbursements incurred in said action, comes now by Wm. Wallace, Jr., John G. Brown and R. F. Gaines, its attorneys, and petitions

the Court for an order allowing the said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also asks that an order be made fixing the amount of security the defendant shall give and furnish upon the said writ of error.

WM. WALLACE, Jr.,  
JOHN G. BROWN,  
R. F. GAINES,  
Attorneys for Defendant.

Due personal service of within petition for writ of error made and admitted, and receipt of copy thereof acknowledged this 4th day of October, 1911.

A. C. McDANIEL,  
WALSH & NOLAN,  
Attorneys for Plaintiff. [61]

[Indorsed]: Title of Court and Cause. Petition for Writ of Error. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. [62]

And thereafter, to wit, on October 4, 1911, an order allowing writ of error was duly made and entered herein, being in the words and figures following, to wit: [63]

*In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Defendant.

**Order Allowing Writ of Error, Etc.**

At a stated term, to wit, April Term, 1911, of the Circuit Court of the United States of America, Ninth Circuit, in and for the District of Montana, held at the courtroom in the city of Helena, State of Montana, on the 4th day of October, 1911; present, the Honorable Carl Rasch, District Judge:

Upon motion of Wm. Wallace, Jr., John G. Brown and R. F. Gaines, attorneys for defendant, and upon filing a petition for writ of error and an assignment of errors, it is ordered that a writ of error be, and is hereby, allowed for a review in the United States Circuit Court of Appeals, for the Ninth Circuit, of the judgment heretofore entered in this cause, and that the amount of bond on the said writ be and the same is hereby fixed at the sum of Two Thousand Dollars, which bond, when given and approved, shall



operate as a supersedeas.

CARL RASCH,  
District Judge.

Due personal service of within order made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,  
WALSH & NOLAN,  
Attorneys for Plff.

[Indorsed]: Title of Court and Cause. Order for Writ of Error. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. [64]

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And thereafter, on Oct. 4, 1911, Bond on Writ of Error was duly filed herein, being in the words and figures following, to wit: [65]

*In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, that the Northern Pacific Railway Company, as principal, and National Surety Company, a corporation, as surety, are held and firmly bound unto Thomas Clark, the plaintiff above named, in the sum

of Two Thousand Dollars, to be paid to the said Thomas Clark, his heirs, legal representatives, or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our successors or assigns, firmly by these presents.

Sealed with our seals, and dated this 4th day of October, 1911.

Whereas, the above-named defendant, Northern Pacific Railway Company, has sued out a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in the above-entitled action, by the Circuit Court of the United States, in and for the District of Montana:

Now, therefore, the condition of this obligation is such that if the above-named Northern Pacific Railway Company shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY COMPANY,

By WM. WALLACE, Jr.,  
Its Division Counsel.

[Corporate Seal]

NATIONAL SURETY COMPANY,

By J. P. DONNELLY,

Its Attorney in Fact Hereto Duly Authorized.

The foregoing bond and surety approved this 4th day of October, 1911, and supersedeas ordered.

CARL RASCH,  
District Judge.

[Indorsed]: Due personal service of within bond made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,  
WALSH & NOLAN,  
Attorneys for Plaintiff.

Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. [66]

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And thereafter, to wit, on Oct. 4, 1911, a Writ of Error was duly issued herein, which said Writ is hereto annexed and is in the words and figures following, to wit: [67]

*In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Defendant.

**Writ of Error [Original].**

United States of America,—ss.

The President of the United States, to the Honorable Judges of the Circuit Court of the United States, for the Ninth Circuit, District of Montana, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said Circuit Court, before you or some of you, between Thomas Clark, plaintiff, and Northern Pacific

Railway Company, defendant, a manifest error hath happened, to the great damage of the said defendant, and plaintiff in error, Northern Pacific Railway Company, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 3d day of November, 1911, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct [68] that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 4th day of October, in the year of our Lord, 1911.

[Seal] GEO. W. SPROULE,  
Clerk of the United States Circuit Court, for the  
Ninth Circuit.

The above writ of error is hereby allowed by,  
CARL RASCH,  
District Judge. [69]

**Answer of Court to Writ of Error [Original].**

The Answer of the Honorable, the Circuit Judges of the United States, Ninth Circuit, District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of said Circuit Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,

Clerk. [70]

Due personal service of within Writ of Error made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,

WALSH & NOLAN,

Attorneys for Plf.

[Endorsed]: No. 836. In U. S. Circuit Court, 9th Circuit, District of Montana. Thomas Clark, Plaintiff, vs. Nor. Pac. Ry. Co., Defendant. Writ of Error. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk.  
————— Deputy.

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And thereafter, to wit, on October 4th, 1911, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit: [71]



*In the Circuit Court of the United States, Ninth  
Circuit, in and for the District of Montana.*

THOMAS CLARK,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY  
(a Corporation),

Defendant.

**Citation [Original].**

United States of America,—ss.

To Thomas Clark, Plaintiff and Defendant in Error,  
and to A. C. McDaniel, and Walsh & Nolan, His  
Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty (30) days from the date of this writ, pursuant to writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Montana, wherein Northern Pacific Railway Company is plaintiff in error, and Thomas Clark is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable CARL RASCH, Judge of the United States District Court for the District of Montana, presiding in the Circuit Court of the United States, for the District of Montana, this 4th

day of October, 1911, and of the Independence of the United States, one hundred and thirty-fifth.

CARL RASCH,

District Judge. [72]

Due personal service of within Citation made and admitted and receipt of copy acknowledged this 4th day of October, 1911.

A. C. McDANIEL,

WALSH & NOLAN,

Attorneys for Plaintiff.

[Endorsed]: No. 836. In U. S. Circuit Court, 9th Circuit, District of Montana. Thomas Clark, Plaintiff, vs. Nor. Pac. Ry. Co., Defendant. Citation. Filed Oct. 4, 1911. Geo. W. Sproule, Clerk. \_\_\_\_\_, Deputy. [73]

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**[Certificate of Clerk U. S. Circuit Court to Record,  
etc.]**

United States of America,  
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 74 pages, numbered consecutively from 1 to 74, inclusive, is a true and correct transcript of the pleadings, process, orders and judgment, and all other proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession as such Clerk; and I further

certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifty-nine 60/100 Dollars (\$59.60), and that the same have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Helena, Montana, this 21st day of October, A. D. 1911.

[Seal]

GEO. W. SPROULE,

Clerk. [74]

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[Endorsed]: No. 2056. United States Circuit Court of Appeals for the Ninth Circuit. The Northern Pacific Railway Company, a Corporation, Plaintiff in Error, vs. Thomas Clark, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Montana.

Filed October 25, 1911.

FRANK D. MONCKTON,

Clerk.

By Meredith Sawyer,

Deputy Clerk.